Filed 10/26/09 In re T.M. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re T. M., a Person Coming Under the Juvenile Court Law.	H034049 (Santa Clara County Super.Ct.No. JD19019)
SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, Plaintiff and Respondent, v. R. M., Defendant and Appellant.	

R. M. appeals from the juvenile court's determination that the mother of R. M.'s daughter T. M. be given custody of the child, that R. M.'s visits with his daughter must be supervised, and that this juvenile dependency case be dismissed. R. M. claims that the case's facts justified keeping it in juvenile court and that the court abused its discretion in relinquishing it and concurrently issuing custody and visitation orders. The court made

these orders under Welfare and Institutions Code sections 362.4 and 388.[1] We disagree with R. M.'s contentions and will affirm the orders and judgment.

FACTS AND PROCEDURAL BACKGROUND

I. *Introduction*

The record shows that there has never been any question of R. M.'s attachment to his daughter T. M. Nor has she had any complaints about him; rather, the record shows that she is well bonded with him. The question before us, however, is whether the juvenile court abused its discretion in terminating the dependency proceedings and finding, in essence, that there was a question whether T. M. was safe when she was with R. M. alone. We recite in detail the portions of the record that disclose facts bearing on that question.

II. *Departmental Action and Findings and Proceedings in Juvenile Court*

In reaching its determination, the juvenile court considered the written reports and recommendations of the Santa Clara County Department of Family and Children's Services (Department) and testimony presented at a contested hearing. We draw the facts from those sources.

T. M. was born in December 2004. Her parents had criminal records and child-rearing problems and she was made the subject of protective court proceedings early in life. Because of the mother's difficulties, notably her physical attacks on R. M.,[2] on

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[1] Further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Although the mother had had domestic problems before these proceedings began, the juvenile court found her to be a sufficiently capable parent that juvenile dependency proceedings could be ended and she could be given custody of T. M. In relinquishing jurisdiction, the juvenile court necessarily determined that there was no longer, with regard to T. M.'s mother, a "preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn." (§ 364, subd. (c).) The court

(continued)

January 20, 2006, the family court gave R. M. physical custody of T. M. with supervised visits for the mother.

After R. M. gained custody of T. M., various referrals were made to the child welfare authorities regarding his caretaking of her. These referrals were unsubstantiated until December of 2007, when one or more sheriff's deputies came to R. M.'s apartment to evict him and found him to be "very drunk." T. M. was naked and diaperless and the apartment contained printed and visual pornography. R. M. was arrested for child endangerment and caretaker absence.

The next day, R. M. was released and met with a social worker for the Department. She thought that he was intoxicated, and he admitted to imbibing alcohol directly after his release from jail. He entered into placement and informal supervision agreements. Evidently he satisfied their requirements. His case was closed in February of 2008 and T. M. was returned to him.

On June 8 or 9 of 2008, R. M. was found in a drunken state while caring for T. M. The police gave T. M. over to a neighbor, but she was soon returned to R. M.

On June 10, 2008, the police paid another visit to R. M. and his daughter. R. M. was asleep and the police smelled alcohol. R. M. was tested and was found to have a blood-alcohol concentration of 0.317 grams per deciliter, almost four times the legal limit for operating a vehicle by an adult. (See Veh. Code, §§ 23152, subd. (b), 23153, subd. (b).) The Department placed T. M. in emergency protective custody.

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found, in essence, that the mother had reformed and should be allowed to raise T. M. in Stockton without further juvenile dependency supervision. In his reply brief, R. M. argues that the section 364 standard can apply only to him and not T. M.'s mother, but he provides no authority for that contention, nor does the statutory language support his interpretation. Moreover, even if R. M. is correct about this, the essential point remains that the juvenile court determined that T. M.'s mother was adequately capable of rearing her.

R. M. admitted to a social worker that he had resumed drinking regularly after fulfilling the terms of his agreements with the Department. He would leave T. M. with a neighbor while he went out to the street to drink with "friends." He denied being an alcoholic.

On June 12, 2008, a juvenile dependency petition was filed on behalf of T. M. pursuant to section 300, subdivision (b) (failure to protect). This petition alleged that R. M. was too burdened by alcoholism to care for T. M. and had been neglectful generally; it also mentioned his long criminal record.

A jurisdiction and disposition report soon followed. It recommended that the petition be sustained and that the case be dismissed with family court orders placing T. M. in her mother's physical and legal custody while providing R. M. with supervised visits.

On September 4, 2008, the parents submitted the jurisdictional issue but contested the dispositional issue.

T. M.'s parents and the social worker testified. The juvenile court found true the petition's allegations and placed T. M. with her mother, providing family maintenance services. The court provided R. M. reunification services that included parenting classes and drug and alcohol treatment programs. It also offered him supervised visits for two hours two times per month and gave the social worker discretion to arrange for unsupervised visits.

In an interim review report prepared for a hearing set for October 23, 2008, the worker reported that T. M. appeared to be doing well in the care of her mother, who was now living in Stockton with T. M.'s stepfather. R. M. was complying with his case plan; the chief issue regarding him was his difficulty in getting to Stockton. He was homeless and evidently very poor, but was working part-time for a community college that he was attending full-time. The child welfare authorities planned to help R. M. find and pay for housing.

The Department's social worker exercised her discretion to change R. M.'s case plan to include unsupervised visits and the first such visit with T. M. was on November 17, 2008. The next day her mother advised the social worker that T. M. was "acting out" sexually on returning home. She was "grinding her pelvis in a sexually provocative manner," "putting her finger in and out of her mouth and saying 'Daddy,' " and removing her underwear, spreading her legs, and pointing to her genital area.[3]

The social worker learned that on May 6, 2008, a San Jose Police Department detective had investigated a report that a 15-year-old babysitter found R. M. lying over T. M. on the bed. After R. M. got up, the babysitter saw wet spots that looked like ejaculate on T. M.'s bed. She also saw wet spots on T. M.'s waistband and a pants leg. Also, the babysitter stated that R. M. failed to respond when T. M. fell at one point. Because of difficulties in verifying any improprieties, however, both the Department and the police department could not find a basis to proceed further. The Department ruled the complaint unfounded and closed its inquiry on June 6, 2008, and the police department decided on or after July 21, 2008, not to take the case to the district attorney, despite the detective's misgivings that something may have happened to T. M.

The social worker investigating the report made by T. M.'s mother also spoke with Peggy Cathcart, a family counselor. The counselor had been contacted by a social worker to both evaluate and help R. M. with regard to his rearing of T. M. when he had custody

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[3] This was not the first time that T. M's sexualized behavior had come to the child welfare authorities' attention. When the Department's social worker got the case T. M.'s mother told her that T. M. "often exhibited sexual acting out behaviors." T. M. would play with her external genitalia, saying "Daddy" while doing so, and would say that her "bottom" hurt. The worker checked with the day-care workers who watched over T. M. from August of 2007 to June of 2008, a time when she was in R. M.'s custody, but they did not notice any such behavior. The social worker advised T. M.'s mother that she could expect "some self exploration" by the then three-year-old T. M., but asked her to keep a written record of T. M.'s behavior.

of her. During a home visit in October of 2007 she observed T. M., sitting in R. M.'s lap, open R. M.'s shirt to the waist, play with his nipples, and jiggle his pectoral muscles. She did not notice any other specific instances of strange behavior during that visit but said that "[t]here was . . . something about [T. M.'s] behavior that left that empty/uncertain 'feeling'—also experienced by at least 3 other workers. I can understand the current social worker's reluctance to support unsupervised visits between [R. M.] and [T. M.]."

On January 14, 2009, the Department petitioned the juvenile court under section 388 to order that R. M. revert to mandatorily supervised visits. The petition also sought therapy for T. M. for possible sexual abuse and therapy for R. M. regarding child sexual abuse.

Trial on the section 388 petition began on March 18, 2009.

Cathcart, who had a contract with the Department "to provide in-home intensive case management services," testified about T. M.'s behavior during her visit to the home. "[S]he crawled up on his lap, facing him, and she was rocking back and forth, touching his face, trying to get his attention. And then she took her hands and . . . pulled open his shirt and [was] pressing on his chest. And then she'd look up at him and giggle and wait for his reaction, and there was no reaction but gradually what I observed him doing, without chastising her or stopping her, was move her hands away and button the shirt up and continue the conversation. Which could have been taken two ways: One, he was not giving it too much emphasis, he was just normalizing it without chastising. Or he didn't react at all at something that could have been as bad. I don't know which it was." "It looked like she was playing a game." "Like it was a game and she was waiting for him to laugh or make some comment like tickle or peekaboo or whatever."

Although witnessing this interaction gave Cathcart an "uneasy feeling," there was nothing so overtly untoward in what she saw that she could feel justified in alerting the Department, and she did not do so. In essence, the behavior was susceptible of more than one interpretation and did not automatically reveal prior sexual abuse.

Michael Gammino, a licensed clinical social worker, testified as an expert in risk assessment and placement of children who have either been sexually abused and/or are displaying sexualized behavior.

Gammino had reviewed Department reports regarding T. M. T. M.'s behavior was sexualized in an "extremely atypical" way for a three-and-a-half-year-old. He lacked a sufficient basis to conclude definitively that R. M. had sexually abused T. M., but "there had to have been something that occurred." The pornography in R. M.'s apartment could not account for T. M.'s behavior, as she was too young to understand the images. Gammino believed that T. M.'s visits with R. M. should be supervised "in order to protect the child."

"I don't want to say he's a perpetrator," Gammino testified. "I think that's very unfair at this time." "[B]ut I think [T. M.] is very adversely affected by his presence on an unsupervised basis."

Lisa Stead, a Department social worker, testified that T. M.'s mother reported that T. M. "started crawling around on her hands and knees and was grinding her pelvis. Then at one point she got down on the floor, took her underwear off, pointed to her genital area and said, 'Daddy.' Then [she] was putting her finger in and out of her mouth in a sexually suggestive manner." Earlier, however, Gammino had testified that T. M. would refer both to R. M. and to her stepfather as "Daddy." Stead testified that T. M.'s mother reported that T. M.'s sexualized behavior was occurring "on a daily basis."

R. M. testified on his own behalf. The pornographic materials found in the home in December of 2007 had been left there by a previous occupant. He was not drunk when the sheriff's deputies came to his home to evict him and discovered the pornography. In any event, he had been clean and sober since June of 2008, when T. M. had been placed in her mother's care. He had performed successfully since then in substance-abuse treatment programs and been cleared in regular substance-abuse tests. He did not know

why T. M. would behave in an unusually sexual manner for her age, and he never saw her do such a thing.

R. M. also testified in essence that the Department's recommendations would make it impracticable to remain bonded to T. M. He had no money to travel to Stockton or pay for a monitor at supervised visits either in Stockton or San Jose (evidently R. M. resided in or near San Jose), and he had no family member able to do the supervising. Moreover, too few hours were allowed for visiting. The supervised visits he had been able to make had gone well, however, and T. M. was pleased to see him.

T. M.'s mother testified that she was "comfortable co-parenting" T. M. with R. M. and that it was important for T. M. to see her father.

The juvenile court granted the section 388 motion—i.e., the Department's motion to rescind authorization for unsupervised visits and require that they be supervised—and adopted the Department's recommendations generally. It found in essence that T. M.'s safety was in jeopardy under the orders then in effect, and it wanted to find "a way to place the child with one parent and protect against the other parent." To protect T. M., it ordered that physical and legal custody of T. M. be with her mother; awarded R. M. two supervised visits per month, one in Stockton and the other in San Jose, but both at his expense; and ordered that the case be dismissed.

DISCUSSION

The father claims that the juvenile court erred under state law in placing T. M. with her mother, ending jurisdiction over the mother, and granting him only supervised visits. We do not agree.

We review a juvenile court's ruling on a section 388 request to modify a prior order for abuse of discretion. (*In re Jasmon O*. (1994) 8 Cal.4th 398, 415-416.) To find an abuse of discretion in a dependency case, the reviewing court must be persuaded that the juvenile court's ruling fell outside the bounds of reason (*In re Stephanie M*. (1994) 7 Cal.4th 295, 318-319), a high burden to surmount.

The juvenile court did not commit an abuse of discretion in modifying its prior order so as to require R. M.'s visits to be supervised. T. M.'s behavior not only was anomalous but was alarmingly so, because the court received evidence that her behavior pointed to a meaningful possibility that someone had sexually molested her. Though nothing against R. M. could be proved, people involved with the case were uneasy about the relationship between him and T. M. and felt, based on their experience in child care, that it could put T. M. at risk to allow R. M. to continue with unsupervised visits. This was not mere speculation or idle rumination, moreover. According to uncontroverted evidence, T. M. had returned from an unsupervised visit with R. M. and begun to act in a sexual way that, according to further such evidence, was highly unusual for a girl who was not yet four years old.

The juvenile court also ruled unobjectionably in placing T. M. with her mother and ending the juvenile court proceedings. We review such a so-called "exit" order for an abuse of discretion. (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300.) Section 362.4, which gives the authority to issue the order, and under which the court issued its final judgment (see § 302, subd. (d)), provides in relevant part: "When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child . . . and . . . an order has been entered with regard to the custody of that minor, the juvenile court . . . may issue . . . an order determining the custody of, or visitation with, the child." We agree with counsel for the minor on appeal that R. M. is not arguing against the court's order that T. M. be with her mother in Stockton—indeed, little in the proceedings below dealt with this question—but instead that the case should remain in the jurisdiction of the juvenile court so that if additional information later shows R. M. not to have sexually molested or abused his daughter, he can visit her under more liberal circumstances. Nevertheless, we find no fault with the court's exercise of its authority to try to provide a safe situation for T. M. while questions remained about R. M. The court did not act contrary to law in doing so. Moreover, R. M. retains a potentially available

legal remedy as good as that which grounds the essence of his argument for the juvenile court to retain jurisdiction: if the family court "finds that there has been a significant change of circumstances since the juvenile court issued the [final custody or visitation] order and modification of the order is in the best interests of the child" (§ 302, subd. (d)) it may modify the juvenile court's final judgment directing that R. M. be entitled only to supervised visits.[4]

[4] In his reply brief, R. M. argues that this case should be governed by section 361.2 and not, to the extent that it is, by section 364. As far as we can tell, however, he never presented this argument to the juvenile court. He has not preserved it for appeal. (See *In re Jason J.* (2009) 175 Cal.App.4th 922, 932; *In re R. C.* (2008) 169 Cal.App.4th 486, 492-493.) Nor did he present it in his opening brief so that other parties could address it. " 'Normally, a contention may not be raised for the first time in a reply brief.' " (*People v. Zamudio* (2008) 43 Cal.4th 327, 353.) Because R. M. did not present this legal theory to the juvenile court, we will not entertain the claim.

CONCLUSION

The juvenile court's custody and visitation orders and its final judgment are affirmed.

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Duffy, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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McAdams, J.